Supreme Court, U.S.
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In the

Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statutory authority of the United States Forest Service to manage public lands includes the authority to preserve in-stream flows for federally protected species by ordering private parties to stop diverting stream water, through ditches they built long ago on federal land, thereby confiscating their water rights vested under state law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Early Winters Ditch Company, Inc., a nonprofit corporation organized under the laws of Washington, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

County of Okanogan, Early Winters Ditch Company, Inc., David C. Jones, and Frances A. Kaul (Water Owners) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The October 29, 2003, opinion of the Ninth Circuit Court of Appeals is reported at *County of Okanogan v. National Marine Fisheries Service*, 347 F.3d 1081 (9th Cir. 2003). It and the judgment are reproduced herein at Appendix (App.) A. The Ninth Circuit's order denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* on October 24, 2003, is reproduced and included herein at App. B. The original unpublished opinion of August 14, 2003, which was the subject of the Petition for Rehearing and Suggestion of Rehearing En Banc, and was replaced by the published decision issued on October 29, 2003, is reproduced and included herein at App. C. The district court's opinion is included herein at App. D.

JURISDICTION

This case was filed in the United States District Court for the Eastern District of Washington. The statutory basis for jurisdiction of the district court is 28 U.S.C. § 1331, due to the presence of a federal question; 28 U.S.C. § 2201 (declaratory relief); 28 U.S.C. § 2202 (injunctive relief); and 16 U.S.C. § 1540(g) (Endangered Species Act (ESA)).

The Ninth Circuit Court of Appeals entered a decision on August 14, 2003. Thereafter, Petitioners sought rehearing and rehearing *en banc*. The court denied rehearing and rehearing *en*

banc on October 24, 2003, but issued a new memorandum opinion and judgment on October 29, 2003, replacing its previous decision and judgment issued August 14, 2003. This Petition for Writ of Certiorari follows. This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS AT ISSUE

The Organic Administration Act of 1897 (Organic Act) is found at 16 U.S.C. § 475. It is set out at App. E.

The Multiple-Use Sustained-Yield Act is found at 16 U.S.C. § 528. It is set out at App. F.

The Federal Land Policy and Management Act is found at 43 U.S.C. § 1701, *et seq.* Relevant provisions are set out at App. G.

The Endangered Species Act, sections 7 and 9, are found at 16 U.S.C. §§ 1536 and 1538. Relevant provisions of those sections are set out at App. H and I.

STATEMENT OF THE CASE

A. Introduction

This controversy involves the confiscation of privately owned water rights by the Forest Service. The Forest Service shut down irrigation ditches, at the point of diversion, crossing federal land so that the water would instead remain in streams and could be used by the Forest Service to maintain flow levels thought beneficial to fish. The Forest Service had no authority to do this.

Approximately one-hundred-years ago, the Petitioners/ Water Owners in this case who are Okanogan farmers and the irrigation companies they formed, obtained from the State of

Washington rights to this irrigation water. These water rights are firmly established private property rights. Specifically, the water rights at issue here are controlled by the State of Washington under the Western states' law of prior appropriation. In Washington, a water right includes not only the use of the water, but also the point from which the water is diverted, or the point of diversion. Wash. Rev. Code Ann. §§ 90.03.250-90.03.340 (West 2004); D. Tarlock, *Law of Water Rights and Resources* §§ 5:42, 5:60-70 (2001) (noting a water right is a "bundle of sticks" comprised of a type of beneficial use, a quantity of water, a season of use, a point of diversion, and a priority date). Indeed, the point of diversion is just as important as the quantity of water. Tarlock, *supra*, § 5:65 ("[A] physical diversion has long been listed as one of the essential elements of a valid appropriation."); *United States v. Union Gap Irrigation Company*, 209 F. 274, 276-77 (E.D. Wash. 1913) (change in point of diversion would impair federal water right); *R.D. Merrill Company v. Washington Pollution Control Hearings Board*, 969 P.2d 458, 462-63 (Wash. 1999) (requiring state approval for change in point of diversion). Thus, in this case, the water right is the right granted by the State of Washington to divert the specified quantity of water from the specified point.

Consistent with the Organic Act and subsequent land management statutes, the Water Owners built two irrigation ditches on unreserved public land to deliver this water across it to their private farmland. Later, the Water Owners obtained special use permits from the Forest Service required to allow them to maintain the irrigation ditches. However, through the Section 7 consultation process of the Endangered Species Act of 1973, the Forest Service has now confiscated the Water Owners' irrigation water for in-stream, fishery protection purposes, by prohibiting them from diverting it into the irrigation ditches.

The Forest Service's use of Section 7 of the ESA to extinguish the Water Owners' water rights circumvents established law that the Forest Service has no right to seize already appropriated waters, *United States v. New Mexico*, 438 U.S. 696, 717 (1978), and that Section 7 does not create new, independent regulatory authority to regulate private water rights. Thus, by shutting off the Water Owners' water and confiscating it to increase river flows to benefit fish, the Forest Service has acted outside its scope of authority. But most importantly and seriously, the Forest Service has turned Western water law upside down by stripping from the State of Washington and taking for itself the power to allocate water rights on federal land within the state.

B. Legal Background

Section 7(a)(2) of the ESA provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . .

16 U.S.C. § 1536(a)(2). Although by its terms Section 7 applies only to activities involving federal agencies, consultation may involve private parties needing federal permits. Section 7 requires federal agencies to consult with the National Marine Fisheries Service or the Fish and Wildlife Service, depending on the species, to determine whether the activity will jeopardize the species or adversely modify critical habitat. This consultation process results in the issuance of a biological opinion. *Id.* § 1536(b).

The biological opinion's purpose is to determine whether and how an activity may impact a listed species and to prescribe conditions under which the activity may be carried out to minimize adverse impacts. One function of the biological opinion is to suggest "reasonable and prudent alternatives" to the proposed action if the action is found to jeopardize a listed species or adversely modify its critical habitat. *Id.* § 1536(b)(4).

When undertaking a Section 7 consultation, the National Marine Fisheries Service and the Fish and Wildlife Service must consider the comprehensive effects of the federal agency action. *See, e.g., National Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976). However, the "reasonable and prudent alternatives" may condition only the federal aspect of the proposed action. *See* 50 C.F.R. § 402.02 (2004) (" '[R]easonable and prudent alternatives' refer to alternative actions . . . that can be implemented . . . consistent with the scope of the Federal agency's legal authority and jurisdiction . . . ."). The Section 7 consultation does not allow the wildlife agencies to regulate those aspects of a federally permitted project that are entirely private and over which the agency has no authority. *Environmental Protection Information Center (EPIC) v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001). A federal agency's mere involvement in private conduct, or the retention of some discretionary control, does not confer upon a federal agency the power to regulate every aspect of a private activity. *Id.* at 1083.

The Forest Service's regulatory authority is governed primarily by the Federal Land Policy and Management Act. That Act governs the regulation and use of irrigation rights-of-way across national forest land. *See* 43 U.S.C. § 1761; 36 C.F.R. § 251.53 (2004). Although the Federal Land Policy and Management Act repealed portions of prior laws, it did not alter the basic policy aims of the national forests as outlined in the Organic Act, 16 U.S.C. § 475 ("for the purpose of securing

favorable conditions of water flows, and to furnish a continuous supply of timber") and the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 ("for outdoor recreation, range, timber, watershed, and wildlife and fish purposes"). Instead, the Federal Land Policy and Management Act required that federal agencies "grandfather" valid existing rights. 43 U.S.C. § 1701(h), Historical Note.

C. Factual Background

1. The Ditches and Water Rights

Early Winters Ditch Company, Inc. (Early Winters), and Skyline Ditch Company (Skyline) deliver water to families and small businesses in the Methow Valley so they can water livestock and grow animal feed, small grain crops, and orchards. These irrigators rely on water rights established and used beneficially for, in most cases, more than 100 years. The State of Washington has developed a complex legal framework for the assignment and protection of these water rights and for the protection of instream flows in the Methow Valley. Wash. Admin. Code § 173-548-020 (2003). Pursuant to Washington law, the Water Owners' water right includes both the use of a specified quantity of water and the point from which the Water Owners divert the water. Wash. Rev. Code Ann. §§ 90.03.250-90.03.340 (West 2003); Tarlock, *supra*, §§ 5:42, 5:60-5:70.

Early Winters claims a water right in the flow of the Methow River under state law with a priority date of 1909.[1] Beginning in 1910, the Forest Service issued a special use permit to Early Winters regulating maintenance of the irrigation ditch.[2] On April 15, 1998, the Forest Service renewed the Early

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[1] App. at A-4.

[2] App. at A-4.

Winters permit for a period of years expiring December 31, 2006.[3]

On January 12, 1903, Skyline filed documents with the United States Department of the Interior establishing the organization of Skyline as an unincorporated association of water users and provided a plat of the irrigation ditch crossing portions of unreserved public land.[4] The Secretary of the Interior approved the Skyline irrigation ditch on July 7, 1903.[5] Beginning only in 1971, the Forest Service issued a special use permit to Skyline regulating maintenance of the ditch.[6]

2. Section 7 Consultation Process

In 1997, the National Marine Fisheries Service listed the Upper Columbia River population of steelhead as an endangered species. 62 Fed. Reg. 43,937 (Aug. 18, 1997). In 1998, the Fish and Wildlife Service listed the Columbia River bull trout as a threatened species under the ESA. 63 Fed. Reg. 31,647 (June 10, 1998). In 1999, the National Marine Fisheries Service listed the Upper Columbia River population of chinook salmon as an endangered species. 64 Fed. Reg. 14,308 (Mar. 24, 1999). Fish belonging to these populations can be found in the Methow River Basin.

In 1998, the Forest Service requested Section 7 consultations with the National Marine Fisheries Service and the Fish and Wildlife Service on the effects of renewing the

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[3] App. at D-2.

[4] App. at A-3.

[5] App. at A-3.

[6] App. at A-3.

Skyline[7] and Early Winters special use permits on these various species.[8] The National Marine Fisheries Service issued final biological opinions for Early Winters on August 2, 2000, and for Skyline on September 8, 2000,[9] resulting in the Forest Service prohibiting Early Winters and Skyline water diversions. These prohibitions, designed to take the Water Owners' vested water and use it to enhance fish habitat, have given rise to this case.[10]

D. The District Court Decision

The district court decided this case on cross motions for summary judgment. The court concluded that Forest Service's authority to keep the Water Owners' water in-stream by denying them the right to divert into the irrigation ditches did not involve a question of water rights but, instead, the ability to exercise power over federal land.[11] The court did acknowledge the federal government has no power to seize state-granted water rights, and if this case were about that, the Water Owners would prevail under *United States v. New Mexico*.[12] Nonetheless, relying exclusively upon the Multiple-Use Sustained-Yield Act, the court upheld the Forest Service's action that directly led to the Forest Service seizing the Water Owners' water rights because it found wildlife preservation was

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[7] App. at A-5.

[8] App. at A-5.

[9] App. at A-5 to A-6.

[10] App. at D-2.

[11] App. at D-3.

[12] App. at D-7.

a valid aim of national forest management.[13] Thus, the Forest Service could shut off the Water Owners' water diversion to serve that federal purpose, despite the fact it seized the Water Owners' water in doing so.

The court acknowledged shutting off the water might have been unlawful prior to the Multiple-Use Sustained-Yield Act, because the Organic Act did not provide that national forests could be managed for wildlife purposes.[14] However, the district court's acknowledgment failed to recognize that the Forest Service's regulations rely only on the Federal Land Policy and Management Act, not the Multiple-Use Sustained-Yield Act, for regulatory authority. *See* 36 C.F.R. § 251.53 (citing only the Federal Land Policy and Management Act). Nevertheless, the court found the Federal Land Policy and Management Act did not diminish the Forest Service's authority under the Multiple-Use Sustained-Yield Act to shut off the Water Owners' water,[15] and as a result confiscate that water for increased fishery flows.

E. The Ninth Circuit Decision

The Ninth Circuit affirmed. It construed this case, like the district court, as one involving Forest Service authority to manage federal land for the benefit of fish pursuant to traditional federal land management statutes. While it observed correctly that "the ESA does not grant powers to federal agencies they do not otherwise have,"[16] it found such power unnecessary, ruling the Forest Service had authority for its actions under not only the Multiple-Use Sustained-Yield Act but the Federal Land Policy and Management Act. It even

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[13] App. at D-5 to D-7.

[14] App. at D-6 to D-7.

[15] App. at D-9.

[16] App. at A-8.

found, unlike the district court, that the Forest Service had authority for its actions under the Organic Act.[17]

While the court acknowledged the primary power of states to manage water resources and allocate water rights among their inhabitants, it failed to recognize that allowing the Forest Service to stop the Water Owners' from diverting their privately owned irrigation water has resulted in the federal government taking over that fundamental power from the states. This petition, then, arises from the Ninth Circuit's opinion that upholds the Agency's unfettered authority to take control of water rights allocations from the states once the water crosses federal land and take that private water when the purpose is to benefit wildlife. This is a dramatic finding that expands federal authority over private, state-granted water rights to a point never before experienced. This is the first time any court has ever granted the federal government such water allocation authority and has the potential to bring chaos to the jurisprudence of not only Washington State water law, but the jurisprudence of water law throughout the entire west most of which is within the jurisdiction of the Ninth Circuit.

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[17] App. at A-10.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT REVIEW BECAUSE THIS CASE INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE—THE UPSETTING OF THE DELICATE FEDERALISM BALANCE EXISTING IN WELL-SETTLED WATER LAW JURISPRUDENCE

A. The Ninth Circuit's Opinion Raises Significant Federalism Concerns by Establishing Federal Authority to Reallocate State Water When the Water Crosses Federal Land

The Ninth Circuit's opinion results in the Forest Service gaining the power to manage water resources Congress reserved exclusively to the states for more than a century under federal law. *See California v. United States*, 438 U.S. 645, 653 (1978) (noting the history of federal land management and water law in the western United States exhibits a "consistent thread of purposeful and continued deference to state water law by Congress"). This deference is evident in no less than 37 federal statutes where Congress requires federal agencies to defer to state water law. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958-59 (1982). Moreover, this Court has observed that the state's control over water rights has its origins not only in federal statutes but in the Constitution. *California*, 438 U.S. 654-55; *New Mexico*, 438 U.S. at 698. The Ninth Circuit's decision stands to impact not only the State of Washington, but other states within the Ninth Circuit's vast jurisdiction.

Under the Equal Footing Doctrine, the states, including Washington, acquired sovereignty over their unappropriated water upon admission to the Union. *California*, 438 U.S. at 654-55. The State of Washington promulgated a statute asserting Washington's dominion over water resources:

> Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise . . . ."

Wash. Rev. Code Ann. § 90.03.010 (West 2004). In Washington State, water rights are managed under the doctrine of prior appropriation. *Id.* Under that doctrine, water rights are created and assigned a priority based on a date when the water right was first put to beneficial use. *Id.* An appropriation can only be approved by the Washington Department of Ecology (Ecology) under specific procedures and limitations. Wash. Rev. Code Ann. §§ 90.22.010-90.22.020 (West 2004). Ecology's authority over water is exclusive:

> No agency may establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state other than the department of ecology whose authority to establish is exclusive . . . .

Wash. Rev. Code Ann. § 90.03.247 (West 2004).

The Ninth Circuit's opinion resulted in a sudden diminishment of state power and allowed the Forest Service to take over the State of Washington's exclusive power to allocate water resources when the purpose is to protect endangered species. In so doing, the Ninth Circuit allowed the Forest Service to reorder the priority of water rights by placing the Water Owners' irrigation water back in-stream where other junior water appropriators who are not subject to Forest Service regulation may use the water. This is a confiscation of the Water Owners' water, promotes unprecedented federal power over water rights, and is wrong. The petition for certiorari should be granted to reaffirm that states, not federal agencies, have domain over their water resources.

B. The Ninth Circuit's Opinion Erodes a Delicate Federalism Balance by Allowing States to Control Water Within Their Own Borders Only Insofar as the Water Is Present on State or Private Land

The Ninth Circuit holds the federal government possesses command and control of state water if it is merely present on federal land. By so holding, the Ninth Circuit opens a Pandora's box concerning upstream and downstream use issues and, with a single decision, disrupts almost 200 years of Western water law.

Because the Ninth Circuit allowed the Forest Service to circumvent state authority over state water, the State of Washington now has competing federal and state frameworks for managing water—depending solely on whether the water is present on federal land or state land. Both Congress and this Court have spoken directly on this conflict:

> A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.

California, 438 U.S. at 668-69. The result of the Ninth Circuit's opinion is precisely what Congress and this Court have repeatedly found unacceptable for more than 200 years. *Id.*

Indeed, in *New Mexico*, this Court noted the significance of state water rights in the West in light of federal water claims. 438 U.S. at 696. In light of the Forest Service's instant assertion of authority over state water that merely crosses federal land, the Ninth Circuit should not have ignored the magnitude of the sea change in water law that would occur were it to blindly accept it. As this Court has observed:

> The percentage of federally owned land . . . in the Western States ranges from 29.5% of the land in the State of Washington to 86.5% of the land in the State of Nevada, an average of about 46%. . . . Because federal reservations are normally found in the uplands of the Western States rather than the flat lands, the percentage of water flow originating in or flowing through the reservations is . . . impressive. More than 60% of the average annual water yield in the 11 Western States is from federal reservations.

Id. at 699 n.3. Given the extreme size of federal land-holdings in the Western states and the scarcity of water in the West, defining the Forest Service's authority to regulate state water found on federal land has incredibly far-reaching effects. With but a single decision, the Ninth Circuit conceivably transferred to the federal government control over more than 60% of the average annual water yield in 11 Western states.

In *New Mexico*, the Forest Service claimed a right to water held pursuant to private water rights granted by state law. *Id.* at 703. This Court noted that the Forest Service did not own such a right and that, in the arid West, the Forest Service's claim would "inescapably vie with other public and private claims." *Id.* at 699. The Court recognized that, because water was scarce, any gain in water sought by the Forest Service would result in a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *Id.* at 705.

The Ninth Circuit's decision conflicts with two centuries of Western water law and congressional enactments, and decades of this Court's precedent. Even more importantly, the Ninth Circuit's decision eviscerates the Western states' authority over the management and allocation of water rights. This Court should grant the petition to restore to the Western states, most of which are within the jurisdiction of the Ninth Circuit, their control over water rights.

II

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT'S OPINION ALLOWING THE FOREST SERVICE TO TAKE OVER A STATE'S PRIMARY ROLE IN WATER ALLOCATION CANNOT BE UPHELD BY REFERENCE TO FEDERAL LAND MANAGEMENT LAWS AND CONSEQUENTLY POSES AN IMPORTANT QUESTION

The Ninth Circuit held that federal land management statutes give the Forest Service authority over water that crosses its land and as a result has given the agency direct power to reallocate and confiscate vested water rights already allocated by the State of Washington. In so doing, the Ninth Circuit's decision turns on its head the water law jurisprudence relied on by a majority of Western states discussed in the previous section by allowing a federal agency to displace the state's primary role in allocating state water resources. The scope of the Forest Service's authority over private water rights under the Organic Act, the Multiple-Use Sustained-Yield Act, and the Federal Land Policy and Management Act is consequently an important issue this Court should review.

The Ninth Circuit's decision results in federal authority that conflicts expressly with this Court's position in *New Mexico*, 438 U.S. at 706-18, upholding a state's primary authority over its water resources. The Ninth Circuit distinguished and in essence set aside *New Mexico*, by stating that case "did not address the power of the Forest Service to restrict the use of rights-of-way over federal land."[18] However, in *New Mexico*, this Court discussed in-depth federal authority under the Organic Act and the Multiple-Use Sustained-Yield Act, including the overriding purposes for which Congress

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[18] App. at A-10.

created national forests and how subsequent legislative grants of authority impact federal authority over water resources.

This Court concluded that national forests serve two purposes: (1) conserving water flows for irrigation and domestic purposes and (2) furnishing a continuous supply of timber. As a result, this Court held that federal authority over federal lands in the Organic Act and the Multiple-Use Sustained-Yield Act does not provide federal agencies authority to reallocate water resources and confiscate private water rights. Accordingly, *New Mexico* should have guided the Ninth Circuit's analysis but, unfortunately, the Ninth Circuit instead declined to follow this Court's precedent.

A. The Forest Service Has No Authority Under the Organic Act to Confiscate Private Water Rights Already Granted by the State of Washington So the Forest Service Can Use That Water for Wildlife Preservation

This Court clarified in *New Mexico* that Congress passed the Organic Act to secure favorable conditions of water flows. 438 U.S. at 707-09. According to the Court, this authority concerns *only* facilitating irrigation and domestic use purposes. *Id.* at 715, 717 n.24. This comports with the fundamental purpose for which Congress enacted the Organic Act—facilitating the utilization of our nation's forests as renewable resources for economic purposes. *Id.* at 707-08 (citing 30 Cong. Rec. 966 (1897)). Indeed, the Court noted specifically that, under the Organic Act, "[n]ational forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes." 438 U.S. at 707-08.

In contrast, Congress created *national parks* for non-economic purposes—*including preservation of fish and wildlife*. *New Mexico*, 438 U.S. at 709. Thus, had Congress sought to preserve the Okanogan National Forest to benefit fish and wildlife, it would have created the Okanogan National

Park. Instead, Congress created the Okanogan *National Forest* to conserve water flows for irrigation and domestic purposes.

Nonetheless, the Ninth Circuit upheld the Forest Service's seizure of the Water Owners' vested water rights for the purpose of benefitting fish, citing as authority the Organic Act. But this Court in *New Mexico* rejected any notion that the Organic Act authorized federal agencies to reserve resources to "improve and protect" fish and wildlife. *Id.* at 711. Thus, the Ninth Circuit improperly distinguished this Court's precedent and has allowed the Forest Service to usurp state authority over the allocation of water rights in direct contravention of long-established water law jurisprudence.

B. The Forest Service Has No Authority Under the Multiple-Use Sustained-Yield Act to Confiscate Private Water Rights Already Granted by the State of Washington So the Forest Service Can Use That Water for the Benefit of Fish

The Ninth Circuit also cited the Multiple-Use Sustained-Yield Act as granting the Forest Service authority to regulate federal land even though such regulation shut off the Water Owners' water, since the regulation was to benefit fish.[19] But in *New Mexico*, this Court held that the Multiple-Use Sustained-Yield Act did not expand the scope of federal agencies' authority to regulate federal land use to include the reallocation of state water resources. This Court clarified that Congress' purposes in the Multiple-Use Sustained-Yield Act are "supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the [Organic Act]." *Id.* at 713 (quoting 16 U.S.C. § 528, *et seq.*). Thus, this Court determined that Congress' purposes for national forests in the Multiple-Use Sustained-Yield Act supplement and promote those in the Organic Act. Indeed, "the Multiple-Use Sustained-Yield Act . . . does not . . . broaden the

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[19] App. at A-9.

purposes for which the [forest] was established under the Organic Act." 438 U.S. at 713.

Accordingly, the Ninth Circuit should have analyzed the Forest Service's authority under the Multiple-Use Sustained-Yield Act from this Court's pronouncement that "[n]ational forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes." *Id.* at 708. Because the Ninth Circuit found authority where Congress had provided none, the Ninth Circuit's holding will "mean a substantial loss in the amount of water available for irrigation and domestic use, thereby defeating Congress' principal purpose of securing favorable condition of water flow." *Id.* at 715. Thus, the Ninth Circuit again misinterpreted a federal land management statute to provide the Forest Service with authority to do indirectly what it may not do directly, reallocate a state's water rights in contravention of western water law jurisprudence. In so doing, the Ninth Circuit contradicted not only this Court's reasoning, but the purposes for which Congress established national forests as set forth in the Organic Act and the Multiple-Use Sustained-Yield Act.

C. The Forest Service Has No Authority Under the Federal Land Policy and Management Act to Confiscate Private Water Rights Already Granted by the State of Washington So the Forest Service Can Use That Water for the Benefit of Fish

According to this Court, if the Forest Service covets state water to benefit fish, it must acquire it under state law like any other water user consistent with the concepts of Western water law jurisprudence. *New Mexico*, 438 U.S. at 702. Misconstruing this Court's pronouncement, the Ninth Circuit held the Forest Service can use its authority under the Federal Land Policy and Management Act to do indirectly what it has no authority to do directly, reallocate private water rights granted under state law thereby confiscating them in order to benefit fish. However, the Forest Service's authority under the

Federal Land Policy and Management Act does not include the authority, whether direct or indirect, to confiscate private water rights.

Indeed, on this point Congress was specific in limiting the Forest Service's authority. The Federal Land Policy and Management Act provides that the Forest Service does not have authority under the Act to eliminate valid existing rights. The statute specifically states that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." 43 U.S.C. § 1701, Savings Provisions § 701 of Pub. L. No. 94-579 at (h). "All authorities are in agreement that the 'subject to valid existing rights' language was essentially designed to restrain agencies from effecting a taking. *See Utah v. Andrus*, 486 F. Supp. 995, 1010 (D. Utah 1979); *Adams v. United States*, 3 F.3d 1254, 1259 (9th Cir. 1993) (citing *Utah v. Andrus*'s holding with approval)." *Stupak-Thrall v. United States*, 89 F.3d 1269, 1270 (6th Cir. 1996). Thus, as water rights are property rights under state law, *see, e.g.*, *John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001), Congress did not provide authority in the Federal Land Policy and Management Act to confiscate private water rights granted under state law.

The Forest Service's authority also should be construed in light of other Federal Land Policy and Management Act provisions limiting the Forest Service's authority over pre-existing rights. Section 701 expressly preserves federal deference to state control over water resources and prohibits Forest Service actions that diminish or interfere with existing water rights created and administered under state law. 43 U.S.C. § 1701. For example, the Forest Service may not construe its authority:

> (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

> (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control . . . .

Id. § 1701(g)(1)-(2), Historical Note.

Thus, in its wisdom, Congress did not attempt to modify Western water law by giving the Forest Service authority to take over a state's responsibility to allocate or reallocate water rights. Nonetheless, the Ninth Circuit held that the Federal Land Policy and Management Act specifically authorizes the Forest Service to shut off the Water Owners' water "without any requirement that the Forest Service defer to state water law."[20]

No dispute exists that the Forest Service may regulate federal land pursuant to the Federal Land Policy and Management Act. However, and more importantly here, no dispute exists either that the Water Owners possess water rights granted by the State of Washington to a specific quantity of water with a specific point of diversion and the Forest Service has no authority to take it over for fish. By seizing the Water Owners' water or interfering with the Water Owners' point of diversion, the Forest Service eliminates vested, existing water rights in contravention of the Federal Land Policy and Management Act and this Court's precedent. The Ninth Circuit stated: "[The Federal Land Policy and Management Act] specifically authorizes the Forest Service to restrict such rights-of-way . . . without any requirement that the Forest Service defer to state water law."[21] Yet, Congress explicitly stated the contrary: "Nothing in this Act . . . shall be construed as . . . expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources

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[20] App. at A-10.

[21] App. at A-10.

development or control . . . ." 43 U.S.C. § 1701(g)(2), Historical Note.

Thus, Congress did not provide the Forest Service with authority in the Federal Land Policy and Management Act to extinguish private water rights by seizing appropriated water. To resolve the conflict between the Ninth Circuit's expansion of the scope of federal power under the Organic Act, the Multiple-Use Sustained-Yield Act, and the Federal Land Policy and Management Act, this Court's pronouncements in *New Mexico*, and Congress' express language, this Court should grant the petition.

III

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE ENDANGERED SPECIES ACT CREATES FEDERAL AUTHORITY TO TAKE OVER FROM THE STATES THE RIGHT TO ALLOCATE WATER RIGHTS AND THEREBY CONFISCATE PRIVATE WATER RIGHTS FOR FISH PROTECTION

The Ninth Circuit's opinion upheld the Forest Service's use of Section 7 consultation to reallocate water to in-stream fishery purposes thereby confiscating private water rights used for irrigation. However, this expansive ruling ignores established law that Section 7 of the ESA does not add to federal agencies' existing authority and consequently provides no more authority than other federal land management statutes. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995). Indeed,

> the statute directs agencies to "utilize their authorities" to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.

Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission, 962 F.2d 27, 34 (D.C. Cir. 1992) (citations omitted). Moreover, not only does Section 7 not enlarge federal authority, it "confers no substantive powers" whatsoever. *American Forest and Paper Association v. United States EPA*, 137 F.3d 291, 298 (5th Cir. 1998). Thus, because Congress did not provide the Forest Service authority to confiscate private water rights in derogation of state law in any other statute, the Ninth Circuit erred in finding such authority through the ESA.

Indeed, by its own terms, the ESA does not authorize federal agencies to confiscate water rights. Rather, the ESA expressly authorizes and provides a funding source for federal agencies to implement programs to conserve fish and other species through the acquisition of lands, waters, or interests therein by purchase or donation. 16 U.S.C. § 1534(a). Moreover, before acquiring such interests, federal agencies must cooperate and consult with the states. *Id.* § 1535(a).

Thus, the ESA itself recognizes the compelling interests of state and local governments in water resource management and declares: "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." *Id.* § 1531(c)(2); *see also Churchill County v. Babbitt*, 150 F.3d 1072 (9th Cir. 1998) (Federal agencies must consider impacts to local government water supplies before implementing programs to purchase water rights.).

Adhering to these principles will not inhibit the Forest Service's ability to carry out its statutory responsibilities under the ESA. The Water Owners claim the Forest Service has no authority over vested water rights under Section 7 of the ESA. However, this does not mean federal agencies do not have the power to protect listed species. On the contrary, the Water Owners merely contend that those federal agencies with responsibility to protect endangered species, the Fish and

Wildlife Service and the National Marine Fisheries Service must exercise their ESA authority under Section 9 rather than Section 7. *See Sierra Club*, 65 F.3d at 1512; *accord EPIC*, 255 F.3d at 1083. Indeed, a ruling requiring federal agencies to seek a remedy through Section 9 would serve the ESA's goals without impairing the Water Owners' vested water rights.

Specifically, Section 9 of the ESA prohibits the "take" of a listed species through actions such as killing, injuring, or harming a protected species. 16 U.S.C. § 1538(a)(1)(B). Section 9 actually provides broader protection for listed species than Section 7 because it applies to nonfederal actions and parties, including the exercise of water rights. *See United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992) (enjoining the use of private water rights until repair of irrigation ditch fish screen to prevent take of salmon). Here, Section 9, not Section 7, is the proper framework Congress provided for analyzing the duties and obligations of nonfederal water rights holders under the ESA. *See EPIC*, 255 F.3d at 1083 (noting Section 9 protects listed species when Section 7 does not apply). Accordingly, this Court should grant the petition to address the important question of whether independent powers are granted federal agencies under the ESA that would allow them to take from states their authority over water allocations leading to the power to confiscate private water rights.

IV

THIS COURT SHOULD GRANT REVIEW TO ADDRESS IMPORTANT CONSTITUTIONAL CONCERNS

There is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States" and " 'with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.' " *California*

v. ARC America Corp., 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This Court recently reiterated that presumption in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001):

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment on a traditional state power.

Id. at 172-73 (citations omitted). The regulation of water resources is a primary responsibility and right of the states, *id.* at 174, yet the Ninth Circuit ignored the principle.

The Ninth Circuit also approved of the Forest Service shutting off the Water Owners' water despite the fact it constitutes an unconstitutional encroachment on private property rights. *See Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 319 (2001) (When a water right is diminished to enhance instream flows for the benefit of ESA-listed fish, a physical taking results requiring just compensation under the Fifth Amendment.). Indeed, the Washington Supreme Court "has consistently held that rights of users of water for irrigation purposes are vested rights in real property." *Washington Department of Ecology v. Grimes*, 852 P.2d 1044, 1052-53 (Wash. 1993).

Federal confiscation of private water rights held under state law via the imposition of instream flow limits does not

constitute mere regulatory conditions. When the Forest Service imposed its in-stream flow conditions by shutting off the water flowing in the Water Owners' irrigation ditches, the Forest Service appropriated a water right.

Because of these constitutional concerns, the Ninth Circuit should have construed the Forest Service's authority to avoid infringing on the powers reserved to the states. This Court should grant the petition to ensure these constitutional questions are properly considered.

CONCLUSION

The Ninth Circuit's holding that the Forest Service possesses authority to confiscate private water rights appropriated under state law contradicts this Court's precedents and Congress' pronouncements limiting federal authority over state water and defining the purposes for which national forests were established. *United States v. New Mexico*, 438 U.S. 696. Moreover, the Ninth Circuit's opinion establishes dual systems of federal and state water rights, contradicting centuries of Western water law and its delicate, yet firm, federalism balance.

This Court should grant the Petition for Writ of Certiorari and reverse the holding of the Ninth Circuit.

DATED: January, 2004.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL,	)	No. 02-35512
	)	D.C. No. CV-01-00192-RHW
Plaintiffs-Appellants,	)	OPINION
v.	)	
NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE, U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor Okanogan National Forest,	)	
Defendants-Appellees,	)	
WASHINGTON ENVIRONMENTAL COUNCIL; OKANOGAN WILDERNESS LEAGUE; CENTER FOR ENVIRONMENTAL LAW	)	

AND POLICY; AMERICAN RIVERS; TROUT UNLIMITED; DEFENDERS OF WILDLIFE,

Defendant-Intervenors-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted
July 9, 2003—Seattle, Washington
Memorandum Filed August 14, 2003
Memorandum Withdrawn October 29, 2003
Filed October 29, 2003

Before: Thomas M. Reavley,* A. Wallace Tashima, and Richard A. Paez, Circuit Judges.

Opinion by Judge Reavley

COUNSEL

Russell C. Brooks, Pacific Legal Foundation, Bellevue, Washington, for the plaintiffs-appellants.

Andrew C. Merger, Department of Justice, Washington, D.C., for the defendants-appellees.

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

John B. Arum, Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle, Washington, for the defendants-intervenors-appellees.

OPINION

REAVLEY, Circuit Judge:

Appellants, plaintiffs below, challenge a decision by the United States Forest Service requiring reduced use of water from ditches in time of low flow, intended to protect certain endangered species of fish. The plaintiffs include Okanogan County, the Early Winters Ditch Company, and several other plaintiffs. The district court granted summary judgment in favor of the federal defendants. We affirm.

BACKGROUND

Plaintiffs use water from the Skyline Irrigation Ditch and the Early Winters Ditch. These ditches traverse the Okanogan National Forest and divert water to plaintiffs for agricultural and other purposes. The Okanogan National Forest was originally set aside as the Washington Forest Reserve in 1897.

The Skyline Irrigation Ditch can be traced to 1903 when the Skyline Ditch Company applied to the Secretary of Interior for a permit to construct and maintain a ditch to take water from the Chewuch River. The permit was granted in July 1903, subject to a contract, which stated:

> It is further agreed and understood that the permission herein granted is subject to revocation by the Secretary of the Interior, in his discretion, at any time, notwithstanding the period for which this agreement is approved may not have then expired.

There followed a special use permit which provided: "Terminable at the discretion of the Forester of the U.S. Department of Agriculture." In 1971, the permit was renewed with a "revocable and nontransferable" special use permit, providing that it may be terminated "at the discretion of the

regional forester or the Chief, Forest Service." This permit further stated that it could be renewed only if the permittee "will comply with the then-existing laws and regulations governing the occupancy and use of National Forest Lands." The permit was renewed in 1979 and 1987, with permits again stating that they were revocable.

The record traces the Early Winters Ditch to 1909, when Harry Briggs and others stated their intent under state law to take water from the Early Winters Creek. The Forest Service granted Briggs a special use permit in 1910 for the Early Winters Ditch, stating that the permittee "shall comply with all the laws and regulations governing National Forests" and that the permit "shall terminate . . . at the discretion of the Forester." The permit was renewed several times. All the later permits were terminable at the discretion of the Forest Service, and further provided that the permit "confers upon the permittee no right to use the water involved." Beginning with the 1971 permit, the Early Winters permits further provided a fixed expiration date and provided that they were subject to renewal only if the permittee complies "with the then-existing laws and regulations governing the use and occupancy of National Forest Lands."

All of the subsequent permits for the two ditches contained similar conditions, stating, for example, that new permits would be issued "in the absolute discretion of the Forest Service," that the permits could be amended at the discretion of the Forest Service to incorporate new terms required by law, and that the permit holder shall comply with all applicable federal laws and standards, including "relevant environmental laws." These permits also stated that they do "not convey any legal interest in water rights as defined by applicable State Law."

Under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44, the National Marine Fisheries Service (NMFS)

listed the steelhead trout and chinook salmon as endangered species, and the Fish and Wildlife Service (FWS) listed the bull trout as a threatened species. The 1998 special use permits were sent with notices stating:

> Please note that the consultation process for this ditch has not been completed with the [NMFS] for the steelhead trout and the chinook salmon nor with the [FWS] for the bull trout. When the consultation is completed, it may be necessary to amend this permit to include conditions which may be required by the [NMFS] or the [FWS].

The ESA provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat . . . .

16 U.S.C. § 1536(a)(2). Under ESA regulations, an agency is required to consult with either the FWS or the NMFS (the consulting agencies) whenever a federal action "may affect" a threatened or endangered species. 50 C.F.R. § 402.14(a) (2002). The designated consulting agency under the ESA makes certain determinations and issues a biological opinion under 16 U.S.C. § 1536(b).

In 1998, the Forest Service made biological assessments for all special use permits on the Chewuch River. It concluded that the Skyline Irrigation Ditch was one of the two largest water diversion ditches on the river, and that the ditch's fish screen was ineffective in protecting the steelhead trout. It concluded that continued operation of the ditch was likely to adversely affect the steelhead and chinook salmon. It similarly

found that the Early Winters Ditch was likely to adversely affect the steelhead and chinook by adversely affecting nesting and spawning areas.

The Forest Service initiated formal consultation with the NMFS and FWS. In 2000, NMFS issued biological opinions for the two ditches. It concluded that a proposed plan for the Early Winters Ditch that included using wells in lieu of surface water diversions during low flow conditions was not likely to jeopardize the steelhead and chinook. However, with respect to the Skyline Irrigation Ditch, the NMFS concluded that proposed modifications to the headgate and the fish screen were insufficient, and that the action as proposed was "likely to jeopardize the continued existence of both steelhead and spring chinook salmon and result in the destruction or adverse modification of designated critical habitat."

Under 16 U.S.C. § 1536(b)(4), agency action can be found not to violate the ESA if "reasonable and prudent alternatives" are implemented, and can be approved subject to the implementation of "reasonable and prudent measures." As to the Skyline Irrigation Ditch, the biological opinion found that measures were necessary to "increase the amount of water in the Chewuch River during low flow periods." The Forest Service therefore amended the Skyline Irrigation Ditch special use permit, requiring that instream flows on the river be measured and that diversions to the ditch be limited to maintain certain instream flows. As to the Early Winters Ditch, the biological opinion found that the proposed plan was acceptable under the ESA provided that reasonable and prudent measures were taken including the maintenance of a minimum instream flow for the creek.

The plaintiffs brought this suit for a declaratory judgment, alleging that the actions of the NMFS, the FWS, and the Forest Service concerning the renewals of the special use permits for the two ditches were unconstitutional and exceeded the

agencies' statutory authority. The court heard cross-motions for summary judgment and granted summary judgment in favor of the federal defendants.

DISCUSSION

Appellants argue that the Forest Service lacked the authority to restrict the use of the ditches to maintain instream flow levels for the protection of fish under the ESA. We agree with the district court that the placement of restrictions in the right-of-way permits was within the authority of the Forest Service.

Whatever questions exist as to the standing of the various appellants, they are represented by the same counsel and make the same arguments, and the Early Winters Ditch Company as a permit holder indisputably has standing. We accordingly proceed to the merits. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 & n.9 (holding that where one plaintiff has standing, "we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit").

At bottom, appellants argue that the Forest Service does not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law. The ditch rights-of-way granted over federal land, from their inception, were subject to termination at the discretion of the federal government through its designated agent. The more recent permits expressly state that they do not convey water rights and are subject to amendment "when, at the discretion of the authorizing officer, such action is deemed necessary or desirable to incorporate new terms, conditions and stipulations as may be required by law, regulation, land management plans, or other management decisions." The ESA and regulations promulgated thereunder require federal agencies to consult with designated consulting agencies whenever a

federal action "may affect" a threatened or endangered species. *See* 50 C.F.R. § 402.14(a) (2002). The regulations provide that such consultation is required for "all actions in which there is discretionary Federal involvement or control," *id.* § 402.03, including the granting of permits or rights-of-way, *id.* § 402.02(c).

Appellants do not argue on appeal that the Forest Service or the other federal agencies violated any of the requirements or protocols of the ESA. Instead, they in effect argue that compliance with the ESA was not authorized because such compliance would deny them their vested water rights under state law. We cannot agree with this argument for several reasons.

[1] There is authority that the ESA does not grant powers to federal agencies they do not otherwise have. The Supreme Court has stated that section 7 of the ESA "amplifies the obligation of federal agencies to take steps *within their power* to carry out the purposes of this act." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1979) (emphasis added, brackets omitted) (quoting 119 Cong. Rec. 42913 (1973)).

[2] However, we are of the view that the Forest Service had the authority to restrict the use of the rights-of-way to protect the endangered fish. The permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way.

[3] The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretaries of the Interior and Agriculture to "grant, issue, or renew rights-of-way over" public lands for "ditches . . . for the . . . transportation . . . of water." 43 U.S.C. § 1761(a)(1). Such rights-of-way "shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment" and that will "require compliance with applicable . . . water quality standards established by or

pursuant to applicable Federal or State law." *Id.* § 1765(a). In addition, the National Forest Management Act requires the Forest Service to specify guidelines for land management plans that "provide for . . . watershed, wildlife, and fish" and "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(A) & (B). The Organic Administration Act, 16 U.S.C. § 475, provides that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows . . . ." The Multiple Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. § 528, provides that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." These statutes, in our view, give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species.

[4] The FLPMA provides that "[n]othing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act," and that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." Pub. L. No. 94-579, § 701(a) & (h), 90 Stat. 2743, 2786-87, *reprinted in* 43 U.S.C.A. § 1701 historical note. Under this savings clause, the government could not under the FLPMA divest a private party of an existing "land use right" or other "valid existing rights," but as described above, the plaintiffs' rights-of-way were always, by their written terms, revocable at the discretion of the federal government. Appellants did not establish that they had vested rights to use the ditches to supply their water needs prior to the enactment of the FLPMA in 1976. On the contrary, the 1901 Act under which the permits were earlier granted provided that right-of-way permits did not grant vested property rights. The 1901 Act

stated that the Secretary of the Interior could grant rights-of-way through forest reservations for ditches, but that "any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (codified at 43 U.S.C. § 959) (repealed 1976).

[5] Appellants rely on *United States v. New Mexico*, 438 U.S. 696 (1978) ("*US v. NM*"). This case held that under a longstanding "implied-reservation-of-water doctrine," *id.* at 701, Congress did not, in enacting the Organic Administration Act and the MUSYA, intend the federal government to reserve water rights for wildlife preservation purposes when it set aside lands for national forests. *US v. NM* did not address the power of the Forest Service to restrict the use of rights-of-way over federal land. As discussed above, the FLPMA specifically authorizes the Forest Service to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law. To quote another Supreme Court case, the pending case "is not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917).

AFFIRMED.

Appendix A–11

JUDGMENT **FILED NOV. 3, 2003**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-35512
CT/AG#: CV-01-00192-RHW

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL

Plaintiffs - Appellants

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor Okanogan National Forest;

Defendants - Appellees

WASHINGTON ENVIRONMENTAL COUNCIL, Washington Environmental Council, Okanogan Wilderness League, Center for Environmental Law and Policy, American Rivers, Trout Unlimited, and Defenders of Wildlife (for purposes of this case are collectively referred to as WEC); OKANOGAN WILDERNESS LEAGUE; CENTER FOR ENVIRONMENTAL LAW AND POLICY; AMERICAN RIVERS; TROUT UNLIMITED; DEFENDERS OF WILDLIFE

Defendant-Intervenors - Appellees

APPEAL FROM the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered October 29, 2003

Appendix B–1

FILED OCT. 24, 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL,	)	No. 02-35512
	)	DC No. CV 01-192 RHW
	)	E.D. Washington
Plaintiffs - Appellants,	)	
v.	)	**ORDER**
NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor Okanogan National Forest,	)	
Defendants - Appellees,	)	
WASHINGTON ENVIRONMENTAL COUNCIL, Washington	)	

Environmental Council, Okanogan Wilderness League, Center for Environmental Law and Policy, American Rivers, Trout Unlimited, and Defenders of Wildlife (for purposes of this case are collectively referred to as WEC); OKANOGAN WILDERNESS LEAGUE; CENTER FOR ENVIRONMENTAL LAW AND POLICY; AMERICAN RIVERS; TROUT UNLIMITED; DEFENDERS OF WILDLIFE,

Defendant-Intervenors - Appellees.

Before: REAVLEY, TASHIMA, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Tashima and Paez vote to deny the petition for rehearing en banc and Judge Reavley so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for panel rehearing and the petition for rehearing en banc are denied.

Appendix C–1

FILED AUG. 14, 2003

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL,	No. 02-35512 D.C. No. CV-01-192-RHW
Plaintiffs-Appellants,	MEMORANDUM*
v.	
NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE, U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor Okanogan National Forest,	
Defendants-Appellees,	

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. Rule 36-3.

WASHINGTON ENVIRONMENTAL COUNCIL; OKANOGAN WILDERNESS LEAGUE; CENTER FOR ENVIRONMENTAL LAW AND POLICY; AMERICAN RIVERS; TROUT UNLIMITED; DEFENDERS OF WILDLIFE,

Defendant-Intervenors-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Before: REAVLEY,** TASHIMA, and PAEZ, Circuit Judges.

Appellants argue that the Forest Service lacked the authority to restrict the use of the Early Winters Ditch and the Skyline Irrigation Ditch to maintain instream flow levels for the protection of fish under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44. We agree with the district court that the placement of restrictions in the right of way permits was within the authority of the Forest Service, and affirm.

Whatever questions exist as to the standing of the various appellants, they are represented by the same counsel and make the same arguments, and the Early Winters Ditch Company as

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** The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

a permit holder indisputably has standing. We accordingly proceed to the merits. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 & n.9 (holding that where one plaintiff has standing, "we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit").

At bottom, appellants argue that the Forest Service does not have the authority to condition the use of the rights of way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law. The ditch rights of way granted over federal land, from their inception, were subject to termination at the discretion of the federal government through its designated agent. The more recent permits expressly state that they do not convey water rights and are subject to amendment "when, at the discretion of the authorizing officer, such action is deemed necessary or desirable to incorporate new terms, conditions and stipulations as may be required by law, regulation, land management plans, or other management decisions." The ESA and regulations promulgated thereunder require federal agencies to consult with designated consulting agencies whenever a federal action "may affect" a threatened or endangered species. *See* 50 C.F.R. § 402.14(a) (2002). The regulations provide that such consultation is required for "all actions in which there is discretionary Federal involvement or control," *id.* § 402.03, including the granting of permits or rights of way, *id.* § 402.02(c).

Appellants do not argue on appeal that the Forest Service or the other federal agencies violated any of the requirements or protocols of the ESA. Instead, they in effect argue that compliance with the ESA was not authorized because such compliance would deny them their vested water rights under state law. We cannot agree with this argument for several reasons.

There is authority that the ESA does not grant powers to federal agencies they do not otherwise have. The Supreme Court has stated that section 7 of the ESA "amplifies the obligation of federal agencies to take steps *within their power* to carry out the purposes of this act." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1979) (emphasis added, brackets omitted) (quoting 119 CONG. REC. 42913 (1973)).

However, we are of the view that the Forest Service had the authority to restrict the use of the rights of way to protect the endangered fish. The permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights of way.

The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretaries of Interior and Agriculture to "grant, issue, or renew rights-of-way over" public lands for "ditches . . . for the . . . transportation . . . of water." 43 U.S.C. § 1761(a)(1). Such rights of way "shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment" and that will "require compliance with applicable . . . water quality standards established by or pursuant to applicable Federal or State law." *Id.* § 1765(a). In addition, the National Forest Management Act requires the Forest Service to specify guidelines for land management plans that "provide for . . . watershed, wildlife, and fish" and "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(A) & (B). The Organic Administration Act, 16 U.S.C. § 475, provides that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows . . . ." The Multiple Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. § 528, provides that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." These statutes, in our view,

give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species.

The FLPMA provides that "[n]othing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act," and that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." Pub. L. No. 94-579, § 701(a) & (h), 90 Stat. 2743, 2786-87, *reprinted in* 43 U.S.C.A. § 1701 historical note. Under this savings clause, the government could not under the FLPMA divest a private party of an existing "land use right" or other "valid existing rights," but as described above, the plaintiffs' rights of way were always, by their written terms, revocable at the discretion of the federal government. Appellants did not establish that they had vested rights to use the ditches to supply their water needs prior to the enactment of the FLPMA in 1976. On the contrary, the 1901 Act under which the permits were earlier granted provided that right of way permits did not grant vested property rights. The 1901 Act stated that the Secretary of Interior could grant rights of way through forest reservations for ditches, but that "any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (codified at 43 U.S.C. § 959) (repealed 1976).

Appellants rely on *United States v. New Mexico*, 438 U.S. 696 (1978) ("*US v. NM*"). This case held that under a longstanding "implied-reservation-of-water doctrine," *id.* at 701, Congress did not, in enacting the Organic Administration Act and the MUSYA, intend the federal government to reserve water rights for wildlife preservation purposes when it set aside lands for national forests. *US v. NM* did not address the power

of the Forest Service to restrict the use of rights of way over federal land. As discussed above, the FLPMA specifically authorizes the Forest Service to restrict such rights of way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law. To quote another Supreme Court case, the pending case "is not a controversy over water rights, but over rights of way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917).

AFFIRMED.

Appendix D–1

FILED MAR. 14, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OKANOGAN COUNTY; EARLY WINTERS DITCH CO.; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL,	)	NO. CS-01-192-RHW
Plaintiffs,	)	**ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT**
v.	)	
NATIONAL MARINE FISHERIES SERVICE; U.S. FISH & WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor, Okanogan National Forest,	)	
Defendants.	)	

Before the Court are two motions for summary judgment: Plaintiffs' Motion for Summary Judgment (Ct. Rec. 37) and Defendants' Cross-Motion for Summary Judgment (Ct. Rec. 46). The Court heard oral argument on these motions on

March 5, 2002. Galen Schuler and Thomas McDonald argued on behalf of Plaintiffs; David Gehlert and Robert Gulley argued on behalf of Defendants; John Arum argued on behalf of Defendant Intervenors. For the reasons discussed below, the Court grants summary judgment in favor of Defendants.

Overview

In the Methow River Valley in north central Washington, ranches and small communities occupy the valley floor. The surrounding land of forests and mountains is primarily owned by the federal government and managed by the United States Forest Service. Plaintiffs are landowners who access water through ditches that traverse Okanogan National Forest land. In order to construct, use, and maintain a ditch on federal land, one must obtain a special use permit from the Forest Service. The Early Winters Ditch originally was constructed, used, and maintained pursuant to a permit filed May 11, 1910. After numerous permit renewals throughout the century, the Early Winters Ditch is now used and maintained pursuant to a permit filed April 15, 1998. In 1997, the National Marine Fisheries Service had listed the steelhead trout as an endangered species; in 1998 the Fish and Wildlife Service had listed the bull trout as a threatened species. As a result, in issuing the 1998 permit, the Forest Service noted that "it may be necessary to amend this permit to include conditions which may be required by the National Marine Fisheries Service or the U.S. Fish and Wildlife Service."

The Forest Service then worked with the National Marine Fisheries Service, and the Fish and Wildlife Service, and Plaintiffs to insure that in issuing the new permit the Forest Service complied with the Endangered Species Act. The subsequent amendments added in 1999 included (among other conditions) restrictions on minimum in-stream flow rate. Plaintiffs' first and second causes of action in this lawsuit address whether the Forest Service has the authority to impose

minimum in-stream flow restrictions in a special use permit. Plaintiffs' third cause of action addresses whether Plaintiffs, in reaching the conclusion that in-stream flow conditions were necessary, applied the Endangered Species Act in an arbitrary and capricious manner. Plaintiffs' fourth cause of action addresses whether Plaintiffs violated the Administrative Procedures Act by following a rule that was not subject to notice and comment. Review is based on the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Does the Forest Service have the power?

At the outset, it is important to note that this is not a controversy about water rights, but over rights-of-way through lands of the United States, which is a different matter. The Government has not claimed a superior water right, nor would this Court have jurisdiction if it did (determination of water rights is a question for state courts). By conditioning a special use permit, the Forest Service does not (and cannot) reserve the water from other users who do not use Forest Service land to access water. Moreover, even though Plaintiffs must comply with the special use permit, they retain their water rights and may be able to divert the water through alternate means or from an alternate diversion point. Claiming a water right is a much more powerful tool in that the in-stream flows at issue could be reserved against *all* users.

Plaintiffs argue that because Defendants do not have the power to claim a water right (see discussion below), the Forest Service is attempting to do indirectly that which it is forbidden from doing directly. However, this argument misstates the question before the Court. Defendants have opted for the much less powerful tool of conditioning a special use permit, and the only question before the Court is whether Congress intended the Forest Service to have this much less powerful tool.

Plaintiffs have argued that although they maintain their water rights, the permit restrictions rise to the level of a taking.

However, Plaintiffs have not raised a taking claim before this Court. The question before the Court is not a controversy about whether Government action constitutes a "taking" for Fifth Amendment purposes.

The question presented is one of Congressional intent regarding the Forest Service's freedom to contract: Did Congress intend that the Forest Service have the power to condition a special use permit to protect, fish by requiring minimum in-stream flows? If the Court finds that the Forest Service does not have this power, the proper remedy is to remand the special use permit to the Forest Service to establish new conditions (noting that the Forest Service would not be allowed to include minimum in-stream flows as a condition). However, the Court finds that Congress intended a broad freedom of contract in issuing special use permits, and that the special use permits at issue do not exceed the Forest Service's power.

A federal agency has all those powers that are (1) granted by statute, and (2) not relinquished through contract. The Court considers each in turn.

> Do the Organic Act and the Multiple Use and Sustained Yield Act authorize the Forest Service to condition a special use permit to protect fish by requiring minimum in-stream flows?

Before 1973, the Early Winter's special use permits were issued pursuant to 43 U.S.C. § 959 (as enacted in 1901), which provides broad permitting discretion:

> The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest and other reservations of the United States [for] canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits.

> . . . [Any] permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public lands, reservation, or park.

Id.

Defendants contend that the Organic Administration Act of 1897 (16 U.S.C. § 473-482) gives the Forest Service broad discretion to incorporate a great variety of permit restrictions, including a requirement of minimum in-stream flows. Plaintiffs contend that, while the Forest Service does have broad Organic Act discretion to incorporate a great variety of permit restrictions, this discretion does not include the right to restrict in-stream flow.

In *United States v. New Mexico*, 438 U.S. 696 (1978), the Supreme Court held that the United States could claim a federal reserve water right for only two purposes: "to conserve the water flows, and to furnish a continuous supply of timber for the people." *Id.* at 707 (internal quotes and citations omitted). These two primary purposes are found in the text of the Organic Act detailing the purposes for which national forests may be established and administered:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.

16 U.S.C. § 475 (as enacted 1897).

Subsequent legislation expanded the purposes of the national forests. In 1960, Congress passed the Multiple Use

Sustained Yield Act, 16 U.S.C. § 528, *et seq.*, which formally recognized some secondary purposes for the national forests:

> It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of . . . this title are declared to be supplemental to, but not in derivation of, the purposes for which the national forests were established as set forth in the [Organic Act].

In *United States v. New Mexico*, the question before the Court was whether Congress, in enacting these new purposes, intended that the new purposes could authorize a reservation of additional water. Again, the Court held that the Government could not reserve a water right for any purpose other than the two primary purposes ("to conserve the water flows, and to furnish a continuous supply of timber for the people"). However, the holding is limited to instances in which the Government is reserving a water right. With respect to the general regulatory authority, the Forest Service retains the broad Organic Act powers to achieve both the primary purposes and the secondary purposes as detailed in the Multiple Use and Sustained Yield Act.

The Forest Service contends that under the Organic Act it has always had the power to condition special use permits to include the maintenance of in-stream flows. The Court rejects this position. While the Organic Act gave broad powers to the government to regulate private uses of the forest, the exercise of that power would have to be consistent with the purposes for which the forest was administered. Restriction on a permit to require in-stream flows would not have been consistent with the purposes of the forest until at least the passage of the Multiple Use and Sustained Yield Act in 1960. While not necessary to a decision, the Court believes that such a restriction prior to the

Multiple Use and Sustained Yield Act would have been arbitrary and capricious.

However, the Multiple Use and Sustained Yield Act changed the proposes for which forests were administered and such purposes had to be considered when the agency was taking action on a permit to use the forest land. These purposes include management for fish and wildlife.

Were Defendants attempting to reserve a water right for these purposes, the holding in *United States v. New Mexico*, *supra*, would require that the Court grant summary judgment in favor of Plaintiffs. However, as discussed above, there are significant differences between "requiring minimum in-stream flows as a condition of a special use permit" and "reserving a water right."

The Court holds that under the Organic Act and Multiple Use and Sustained Yield Act, Congress intended the Forest Service to have broad powers in regulating private uses of forest land. This power includes conditioning special use permits to require minimum in-stream flows to protect fish where consistent with the forest purposes, as defined by Congress. This power was further defined and limited by Congress in the Endangered Species Act, as discussed, *infra*.

Does Subsequent Legislation Diminish Authority to Condition a Special Use Permit by Requiring Minimum In-stream Flows?

After 1976, the Early Winters special use permits were issued pursuant to the Federal Land Policy and Management Act, 43 U.S.C. § 1761-1771. Although the Federal Land Policy and Management Act is substantially more detailed than its predecessor, the details do not address whether the Forest Service may condition a special use permit by requiring minimum in-stream flows. Plaintiffs contend that the following

savings provisions limit the Forest Service power to condition special use permits:

> (a) Nothing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act. . . .
>
> . . .
>
> (g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—
>
> (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;
>
> (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control; . . .
>
> . . .
>
> (4) as superseding, modifying, or repealing, except as, specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto;
> . . .
>
> . . .
>
> (h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. § 1701, Historical Note.

The Court reads this statutory language as showing an intent to preserve the status quo with respect to federal and state jurisdiction over the use of water on federal land. Specifically, (1) existing special use permits will remain valid until their expiration dates; (2) existing water laws are unaffected; (3) existing jurisdiction and federal rights are unaffected; (4) existing agency powers are unaffected; and (5) existing rights are unaffected. Therefore, if the Forest Service had the power to impose minimum in-stream flow restrictions in a special use permit, the Forest Service retains this power. If, however, the Forest Service was attempting to claim a water right or exercise a power not authorized under its authority, the Federal Land Policy and Management Act would prohibit the action. As discussed above, the Court finds that the Forest Service is not attempting to claim a water right, and the Forest Service is authorized to impose minimum in-stream flow restrictions in a special use permit. The Federal Land Policy and Management Act does not diminish this power.

Plaintiffs also maintain that the Alaska National Interest Lands Conservation Act (16 U.S.C. § 3102, *et. seq.*) diminishes the authority of the Forest Service. The statute reads:

> Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure the owner the reasonable use and enjoyment thereof.

16 U.S.C. § 3210(a).

Although water is included in the definition of lands under the Act, this provision does not create a right to transmit and distribute water across federal land. Specifically, "access" is defined as "the ability of landowners to have ingress and egress to their lands," and "does not include right-of-way for power

lines or other utilities." 36 C.F.R. § 251.111. Moreover, even if 16 U.S.C. § 3210(a) were applicable, a plaintiff seeking judicial confirmation of a right of access under that provision would bear the burden of applying to the administrative agency for such a right and the agency's action would be constrained by the Endangered Species Act, as discussed *infra*.

Finally, Plaintiffs maintain that the 1986 amendment to the Federal Land Policy and Management Act (the "Ditch Bill") diminishes the Organic Act authority of the Forest Service. Plaintiffs cite the following passage:

> Nothing in this bill is intended to establish a basis for federal decisions affecting the timing of water delivery or the amount of water to be released through a water conveyance system. . . . the Committee intended to avoid any implication that a federal land manager was to be given, *through this legislation*, authority to regulate such matters as in-stream flows or the appropriation, use or diversion of water. . . .

House Report on 1986 "Ditch Bill" Amendment to FLPMA 43 U.S.C. § 1761(c)(3)(B) (1986 U.S.C.C.A.N. 5086, 5089) (emphasis added). The cited language makes clear that the legislation does not intend to expand the authority of the Forest Service, but makes no indication whatsoever of an intent to limit previously authorized powers of the Forest Service.

> Did the Forest Service relinquish its power through contract?

Even if the Forest Service had the power to condition a special use permit by requiring minimum in-stream flows, the Court must also determine whether the Forest Service relinquished this power through contract.

Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995), tells the story of a federal agency that relinquished a power through

contract. In that case, Woolley (a private logging company) wanted to construct a logging road on land controlled by the Bureau of Land Management. In deciding the terms of a contract with a private party, the Bureau of Land Management (like the Forest Service) presumably could require any terms consistent with the Bureau of Land Management's statutory mission. In 1962, Woolley and the Bureau of Land Management decided on the following agreement:

> Construction may be commenced after the expiration of a thirty (30) day period following the filing of such map unless in the intervening period the landowner may object to such construction. The landowner may object to the proposed construction only if (1) it does not constitute the most reasonably direct route for the removal of forest products from the lands of the road builder, taking into account the topography of the area, the cost of road construction in the safety of use of such road, (2) the proposed road will substantially interfere with existing or planned facilities or improvements on the lands of the landowner, or (3) would result in excessive erosion to lands of the landowner.

Id. at 1506.

In 1973, the statutory purpose of the Bureau of Land Management changed. The question in *Sierra Club* was, given the new statutory purpose, could the landowner object to the proposed construction because (4) a listed species would be affected? The Ninth Circuit answered that the Bureau of Land Management was bound by the terms of the contract, and that "these three factors are the only conditions the BLM properly could consider." *Id.* at 1511. In other words, although the Bureau of Land Management initially had the power to condition the construction on *any terms consistent with its*

statutory mission, once it entered into the contract, it limited its power to object to the three specifically listed conditions.

Babbitt is easily distinguishable from the case before the Court. First, *Babbitt* deals with a one-time contract, with no indication of expiration or need for renewal. Thus, the agency in *Babbitt* had no further action to take (indeed, one party in the case maintained that Section 7 did not apply precisely because Bureau of Land Management's conduct was inaction). Early Winters deals with a contract that expires and is subject to renewal. Renewal and modification of the contract (as expressly anticipated by the terms of the previous contract) qualifies as an "action" that triggers Section 7 review. With the expiration of the prior permit, the Forest Service begins anew to negotiate the renewal permit, and is not bound by any language of the prior permit.

Second, the language of the contract in *Babbitt* narrowly confined the circumstances in which the landowner can object to the construction. In Early Winters, the language of the contract is much more broad. Specifically, every permit issued by the Forest Service in this case gives the Forest Service broad discretion to revoke a permit.

The 1998 special use permit provides that the Forest Service can revoke the permit (object to the right-of-way) for:

> (1) Noncompliance with Federal, State, or local laws and regulations.
>
> (2) Noncompliance with the terms and conditions of this permit.
>
> (3) Reasons in the public interest.
>
> (4) Abandonment or other failure of the holder to otherwise exercise the privileges granted.

EW 265.

The Court finds that the Forest Service has the power to condition a special tree permit by requiring minimum in-stream flows, and that the Forest Service did not relinquish this power through contract.

Violation of the Endangered Species Act (Third Cause of Action)

Having found that the Forest Service has the power to impose minimum in-stream flow restrictions in a special use permit, the Court now turns to the question of whether Defendants properly exercised this power. Specifically, the Court addresses the question of whether the Endangered Species Act requires the Forest Service to impose the minimum in-stream flow restrictions at issue in this case. Under the Administrative Procedures Act, administrative agency action should be set aside if it is arbitrary and capricious, or an abuse of discretion, or not in accordance with the law. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995).

Standing

The parties agree that Plaintiff Early Winters has standing as to the first, second, and fourth causes of action, and that the Court need not determine the other Plaintiffs' standing to bring those claims so long as Early Winters remains in the case. The parties agree that Plaintiff Early Winters has standing on the portion of the third cause of action pertaining to the Early Winters special use permit and biological opinion. However, the Court must determine whether any Plaintiff has standing on the portion of the third cause of action pertaining to the Skyline special use permit and biological opinion. For the reasons discussed below, the Court finds that no Plaintiff in this case has standing to request review of whether Defendants violated; the Endangered Species Act in the process of issuing the Skyline special use permit and biological opinion.

David Jones and Frances Kaul own approximately 10 acres of land and appurtenant water rights that are served by the Skyline irrigation ditch. They also own shares in the Skyline Ditch Company, the holder of one of the special use permits at issue in this case. Although the Skyline Ditch Company decided not to participate in this lawsuit, Plaintiffs argue that Jones and Kaul have standing because Defendants' action is a regulation of water rights owned by Jones and Kaul. As noted above, this is not a controversy about water rights, but over rights-of-way through lands of the United States, which is a different matter. Plaintiffs have requested injunctive relief, that the Court prohibit the Government from enforcing the Skyline Ditch special use permit. Jones and Kaul have no standing to demand a changed the conditions of the Skyline special use permit (a permit held by Skyline Ditch Company, not a party before the Court).

Plaintiffs argue that Okanogan County has standing because, in planning for water policy, Okanogan County works closely with (and depends on the decisions of) the federal agencies involved in this case. This relationship does not rise to the "concrete and particularized" interest required to establish standing. If Okanogan County owned property that would be affected by the special use permit, it may have been able to establish standing. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995); *Churchill County v. Babbitt*, 150 F.3d 1072, 1079 (9th Cir. 1998); *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1438 (10th Cir. 1996). However, Okanogan County has not shown that it owns property that would be directly and greatly affected by the proposed action.

Endangered Species Act Overview

In this matter, the Forest Service claims that the Endangered Species Act requires the Forest Service to exercise its power in imposing the minimum in-stream flow restrictions

on the Early Winters special use permit. The Endangered Species Act, enacted in 1973, provides in relevant part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . .

16 U.S.C. § 1536. In *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), the Supreme Court detailed the impact of the Endangered Species Act on the purposes of all federal agencies. The Endangered Species Act fundamentally changed the purpose of every federal agency:

> Section 7 substantially amplifies the obligation of federal agencies to take steps within their power to carry out the purposes of this act. . . . The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of government is committed to see that those purposes are carried out. The agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.

Id., at 183-84.

Note, however, that while the Endangered Species Act does fundamentally affect the purpose of every federal agency, the Endangered Species Act does not enlarge the powers of the agencies. Rather, each agency must take steps "within their power" to carry out the additional purposes. "[T]he statute directs agencies to 'utilize their authorities' to carry out the Endangered Species Act's objectives; it does not *expand* the

powers conferred on an agency by its enabling act." *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992); *American Forest & Paper Ass'n v. United States Envtl. Prot. Agency*, 137 F.3d 291 (5th Cir. 1998).

Here, the flow-rate conditions do not represent an addition of Forest Service power but, rather, a contraction. Before passage of the Endangered Species Act, the Forest Service had broad discretion in formulating conditions for special use permits—it could issue permits that would adversely affect endangered species. After passage of the Endangered Species Act, the Forest Service no longer has broad discretion—it no longer may issue permits that will adversely affect endangered species. Rather than expanding the power, the Endangered Species Act qualifies the scope of the existing power.

Moreover, as discussed above, the Organic Act and Multiple Use and Sustained Yield Act empower the Forest Service to impose minimum in-stream flow restrictions in a special use permit to protect fish. In complying with the Endangered Species Act, the Forest Service is not exercising a new power but, rather, considering a new factor (effects on endangered species) when exercising given powers.

Specific Objections

(1) Plaintiffs argue that because Defendants have no discretion to condition a special use permit by requiring minimum in-stream flows, Defendants have no basis for consultation on in-stream flows. Having ruled that Defendants do have discretion to condition a special use permit by requiring minimum in-stream flows (see above), the Court finds that Section 7 consultation was properly triggered.

(2) Plaintiffs argue that the environmental baseline used for establishing the Early Winters Biological Opinion must include the impact of the current special use permit and use of existing water rights. The environmental baseline "includes the

past and present impacts of Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early Section 7 consultation; and the impact of State or private actions which are contemporaneous with the consultation in progress." 50 C.F.R. § 402.02. Given that baseline, the agency must determine the impact of the current action (here, permit renewal). When consulting about the effects of a renewal permit relative to the environmental baseline, it is nonsensical to include that same renewal permit in the baseline. At very least, Defendants did not abuse their discretion in determining the relevant baseline.

(3) Plaintiffs argue that 50 C.F.R. § 402.14(g)(4) is invalid, as it requires the agency to consider cumulative effects, specifically the effects of other existing water users (whose rights may be junior to Plaintiffs) and anticipated newcomers. Once Section 7 triggers consultation, the agency must evaluate all the effects of reissuing the special use permit, even if the agency does not have control over some effects. Although Defendants do not have control over all water users that that effect the steelhead trout and bull trout, Defendants are charged with the responsibility of making sure that the powers they do have (including the power to issue special use permits) are not utilized to have an adverse effect on the protected animals.

(4) Plaintiffs argue that Defendants have abused their discretion in equating the "jeopardy" standard (a standard dealing with the survival of the species) with the "properly functioning conditions" or "recovery" standard (a higher standard dealing with the recovery of a species). The Court finds that the administrative record supports a finding that, at least for the specific situation of the fish at issue in this case, the actions that would ensure the species survival might be the same (or at least are an important factor to consider) as those needed to achieve recovery. This is not to say that "recovery" is always equal to "survival" but, rather, simply that in this

case, for these fish, on this administrative record, it was not an abuse of discretion for the Defendants to so find.

(5) Plaintiffs argue that the National Marine Fisheries Service and Fish and Wildlife Service should have deferred to the Forest Service's "no authority" contention. The Court agrees that before issuing a special use permit, the Forest Service (and not the National Marine Fisheries Service and Fish and Wildlife Service) ultimately must determine whether the Forest Service has proper authority to include conditions in the permit. There is no indication that the National Marine Fisheries Service and Fish and Wildlife Service have forced the Forest Service to include the conditions in the permit.

Violation of the Administrative Procedures Act (Fourth Cause of Action)

The Court finds that these defendants did not abuse their discretion in their efforts to comply with the Endangered Species Act.

Under the Administrative Procedures Act (APA), administrative agency action should be set aside if it is arbitrary and capricious, or an abuse of discretion, or not in accordance with the law. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995).

Before engaging in "rule-making," an agency must provide the public notice and an opportunity to comment. The parties agree that National Marine Fisheries Service uses the "Habitat Approach" for Endangered Species Act consultation, and the public has been afforded neither public notice nor opportunity to comment. The question for the Court, then, is this: Is the "Habitat Approach" a rule? Case law suggests that the "Habitat Approach" is a rule if (1) it is controlling, (2) the agency treats it like a rule, (3) the agency leads applicants to believe that it is a rule, or (4) enforcement of agency policy is based on it. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021. In

determining whether the "Habitat Approach" is a rule, the critical factor is "the extent to which the challenged directive leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the announced policy in an individual case." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987).

Here, Defendants have provided three examples in which the National Marine Fisheries Service staff exercised the "discretion to dispense with this analytic tool altogether." *See* Defendants' Reply Memorandum, p. 13. The Court finds that the "Habitat Approach" is not a role, and is not subject to the notice and comment requirements of the APA.

CONCLUSION

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Summary Judgment (Ct. Rec. 37) is **DENIED**.

2. Defendants' Cross-Motion for Summary Judgment (Ct. Rec. 46) is **GRANTED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 13 day of March 2002.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

Appendix E–1

16 USCA § 475
16 U.S.C.A. § 475

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 2—NATIONAL FORESTS
SUBCHAPTER I—ESTABLISHMENT
AND ADMINISTRATION

§ 475. Purposes for which national forests may be established and administered

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

Appendix F–1

16 USCA § 528
16 U.S.C.A. § 528

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 2—NATIONAL FORESTS
SUBCHAPTER I—ESTABLISHMENT
AND ADMINISTRATION

§ 528. Development and administration of renewable surface resources for multiple use and sustained yield of products and services; Congressional declaration of policy and purpose

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

Appendix G–1

43 USCA § 1701
43 U.S.C.A. § 1701

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 35—FEDERAL LAND
POLICY AND MANAGEMENT
SUBCHAPTER I—GENERAL PROVISIONS

§ 1701. Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that—

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the

Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

* * *

HISTORICAL AND STATUTORY NOTES

* * *

Savings Provisions

Section 701 of Pub.L. 94-579 provided that:

"**(a)** Nothing in this Act [see Short Title note under this section], or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976].

* * *

"**(f)** Nothing in this Act shall be deemed to repeal any existing law by implication.

"**(g)** Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—

"**(1)** as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

"**(2)** as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control;

* * *

"**(h)** All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

* * *

43 USCA § 1761
43 U.S.C.A. § 1761

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 35—FEDERAL LAND
POLICY AND MANAGEMENT
SUBCHAPTER V—RIGHTS-OF-WAY

§ 1761. Grant, issue, or renewal of rights-of-way

(a) Authorized purposes

The Secretary, with respect to the public lands (including public lands, as defined in section 1702(e) of this title, which are reserved from entry pursuant to section 24 of the Federal Power Act (16 U.S.C. 818)) and, the Secretary of Agriculture, with respect to lands within the National Forest System (except in each case land designated as wilderness), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for—

(1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water;

* * *

(c) Permanent easement for water systems; issuance, preconditions, etc.

(1) Upon receipt of a written application pursuant to paragraph (2) of this subsection from an applicant meeting the requirements of this subsection, the Secretary of Agriculture shall issue a permanent easement, without a requirement for reimbursement, for a water system as described in subsection (a)(1) of this section, traversing Federal lands within the National Forest System ("National Forest Lands"), constructed and in operation or placed into operation prior to October 21, 1976, if—

(A) the traversed National Forest lands are in a State where the appropriation doctrine governs the ownership of water rights;

(B) at the time of submission of the application the water system is used solely for agricultural irrigation or livestock watering purposes;

(C) the use served by the water system is not located solely on Federal lands;

(D) the originally constructed facilities comprising such system have been in substantially continuous operation without abandonment;

(E) the applicant has a valid existing right, established under applicable State law, for water to be conveyed by the water system;

(F) a recordable survey and other information concerning the location and characteristics of the system as

necessary for proper management of National Forest lands is provided to the Secretary of Agriculture by the applicant for the easement; and

(G) the applicant submits such application on or before December 31, 1996.

(2)(A) Nothing in this subsection shall be construed as affecting any grants made by any previous Act. To the extent any such previous grant of right-of-way is a valid existing right, it shall remain in full force and effect unless an owner thereof notifies the Secretary of Agriculture that such owner elects to have a water system on such right-of-way governed by the provisions of this subsection and submits a written application for issuance of an easement pursuant to this subsection, in which case upon the issuance of an easement pursuant to this subsection such previous grant shall be deemed to have been relinquished and shall terminate.

(B) Easements issued under the authority of this subsection shall be fully transferable with all existing conditions and without the imposition of fees or new conditions or stipulations at the time of transfer. The holder shall notify the Secretary of Agriculture within sixty days of any address change of the holder or change in ownership of the facilities.

(C) Easements issued under the authority of this subsection shall include all changes or modifications to the original facilities in existence as of October 21, 1976, the date of enactment of this Act.

(D) Any future extension or enlargement of facilities after October 21, 1976, shall require the issuance of a separate authorization, not authorized under this subsection.

(3)(A) Except as otherwise provided in this subsection, the Secretary of Agriculture may terminate or suspend an easement issued pursuant to this subsection in accordance with the procedural and other provisions of section

1766 of this title. An easement issued pursuant to this subsection shall terminate if the water system for which such easement was issued is used for any purpose other than agricultural irrigation or livestock watering use. For purposes of subparagraph (D) of paragraph (1) of this subsection, non-use of a water system for agricultural irrigation or livestock watering purposes for any continuous five-year period shall constitute a rebuttable presumption of abandonment of the facilities comprising such system.

(B) Nothing in this subsection shall be deemed to be an assertion by the United States of any right or claim with regard to the reservation, acquisition, or use of water. Nothing in this subsection shall be deemed to confer on the Secretary of Agriculture any power or authority to regulate or control in any manner the appropriation, diversion, or use of water for any purpose (nor to diminish any such power or authority of such Secretary under applicable law) or to require the conveyance or transfer to the United States of any right or claim to the appropriation, diversion, or use of water.

(C) Except as otherwise provided in this subsection, all rights-of-way issued pursuant to this subsection are subject to all conditions and requirements of this Act.

(D) In the event a right-of-way issued pursuant to this subsection is allowed to deteriorate to the point of threatening persons or property and the holder of the right-of-way, after consultation with the Secretary of Agriculture, refuses to perform the repair and maintenance necessary to remove the threat to persons or property, the Secretary shall have the right to undertake such repair and maintenance on the right-of-way and to assess the holder for the costs of such repair and maintenance, regardless of whether the Secretary had required the holder to furnish a bond or other security pursuant to subsection (i) of this section.

* * *

Appendix H–1

16 USCA § 1536
16 U.S.C.A. § 1536

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 35—ENDANGERED SPECIES

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

* * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * *

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

* * *

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title; the

Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

* * *

Appendix I–1

16 USCA § 1538
16 U.S.C.A. § 1538

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 35—ENDANGERED SPECIES

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * *